Bacom Enterprises Sdn Bhd v Jong Chuk & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q-02-500 OF 1997
NH CHAN, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
16 MARCH 1998

Civil Procedure *— Pleadings — Amendment of — Application to amend defence and counterclaim — Proposed amendments were extensive and introduced two new issues — Whether amendments should be allowed — Whether amendments merely consequential and for clarifications — Whether amendments, if allowed, would cause injustice or prejudice which cannot be compensated by costs — Whether amendment which was in response to the amended statement of claim should be allowed*

The first respondent was given leave to amend para 26 of its statement of claim. As a result, the appellant applied to have its amended defence and counterclaim re-amended. The appellant had amended virtually every paragraph of the statement of defence and counterclaim. It was not confined to the defence of para 26 of the first respondent's statement of claim. In addition to that, the appellant had introduced two entirely new issues of breach and anticipatory breach on the part of the first respondent. The judge dismissed the appellant's application. The appellant appealed. It was submitted that the proposed re-amendments were merely consequential amendments and for clarifications. As such, the judge had erred when he refused the application. The first respondent submitted that if leave were to be given to the appellant, it should only be confined to para 18 of the proposed re-amended statement of defence and counterclaim which was in reply to the amended para 26 of the statement of claim of the first respondent.

Held, allowing the appellant to re-amend its amended statement of defence and counterclaim only in terms of para 18 of the proposed re-amended statement of defence and counterclaim:

Generally, the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed, would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of money. Each application must therefore be decided on its own merit. Although in the present appeal the judge had the discretion whether or not to grant the appellant's application for the amendment, and there is a presumption that he was right in the exercising of his discretion, an appellate court could review and interfere with the exercise of his discretion if it was satisfied that the judge had erred in principle.

In the present appeal, as a matter of principle, the judge — having allowed the first respondent to amend his statement of claim

against the appellant — should have also allowed the appellant to amend its statement of defence and counterclaim strictly in reply to para 26 of the statement of claim. As such, the judge should have allowed the amendment as contained in para 18 which was in response to the first respondent's amendment to para 26 of the statement of claim. However, the judge was right in refusing to allow all the other amendments sought by the appellant. The proposed re-amended statement of defence and counterclaim of the appellant was substantially amended from top to bottom. There were new allegations of breach against the first respondent in the re-amended statement of defence. These amendments were certainly not consequential amendments. To allow re-amendments in toto was to give the appellant the second opportunity to improve its case by bringing in two new issues of breach and anticipatory breach on the part of the first respondent after he had closed his case. Clearly, this would be against and prejudicial to the first respondent, which could not be compensated by costs (see pp 306B–C, 307C–E and 308A–D).

[Bahasa Malaysia summary

Penentang pertama telah diberikan kebenaran untuk meminda perenggan 26 pernyataan tuntutannya. Akibatnya, perayu memohon supaya pembelaan dan tuntutan balasnya yang terpinda dipinda semula. Perayu telah meminda hampir-hampir setiap perenggan pernyataan pembelaan dan tuntutan balas. Ia tidak terhad kepada pembelaan perenggan 26 pernyataan tuntutan penentang pertama. Di samping itu, perayu telah memperkenalkan dua isu baru kemungkiran dan mungkir dalam jangkaan pada pihak penentang pertama. Hakim menolak permohonan perayu. Perayu membuat rayuan. Adalah dihujahkan bahawa pindaan semula yang dicadangkan cumalah pindaan berbangkit dan untuk mendapatkan penjelasan. Oleh yang demikian, hakim terkhilaf apabila beliau menolak permohonan. Penentang pertama menghujahkan bahawa andainya kebenaran diberikan kepada perayu, ia haruslah terbatas kepada perenggan 18 pernyataan pembelaan dan tuntutan balas dipinda semula yang dicadangkan yang membalas perenggan 26 terpinda pernyataan tuntutan penentang pertama.

Diputuskan, membenarkan perayu meminda semula pernyataan pembelaan dan tuntutan balas terpinda hanya dari segi perenggan 18 pernyataan pembelaan dan tuntutan balas terpinda semula yang dicadangkan:

Pada umumnya, pelaksanaan kuasa untuk membenarkan atau menolak pindaan pliding di mana-mana peringkat prosiding terletak dalam budi bicara hakim, tetapi kuasa mestilah selalunya dilaksanakan secara kehakiman dengan mengambil kira amalan yang lazim dan sama ada pindaan yang diminta oleh suatu pihak, jika dibenarkan, akan menyebabkan ketidakadilan atau kemudaratan kepada satu lagi pihak yang tidak boleh dipampas dengan kos, dengan mengingati bahawa ia tidak selalunya mudah untuk menyukat keadilan dari segi wang.

Dengan itu setiap permohonan mestilah diputuskan atas merit sendiri. Walaupun dalam rayuan ini hakim mempunyai budi bicara sama ada untuk membenarkan permohonan perayu untuk pindaan atau tidak, dan terdapat anggapan bahawa dia adalah betul dalam melaksanakan budi bicara, sebuah mahkamah rayuan boleh mengkaji semula dan mengganggu pelaksanaan budi bicara sekiranya ia berpuas hati bahawa hakim terkhilaf dalam prinsip.

Dalam rayuan ini, sebagai satu perkara prinsip, hakim — setelah membenarkan penentang pertama meminda pernyataan tuntutannya terhadap perayu — sepatutnya juga membenarkan perayu meminda pernyataan pembelaan dan tuntutan balasnya hanya sekadar menjawab perenggan 26 pernyataan tuntutan. Oleh itu, hakim sepatutnya membenarkan pindaan seperti yang terkandung dalam perenggan 18 yang membalas pindaan penentang pertama kepada perenggan 26 pernyataan tuntutan. Namun demikian, hakim adalah betul dalam keengganan untuk membenarkan kesemua pindaan lain yang dipohon oleh perayu. Pernyataan pembelaan dan tuntutan balas perayu terpinda semula yang dicadangkan telah dipinda secara substantial dari mula ke akhir. Terdapat pengataan kemungkiran yang baru terhadap penentang pertama dalam pernyataan pembelaan yang terpinda semula. Pindaan-pindaan ini sesungguhnya bukanlah pindaan berbangkit. Untuk membenarkan pindaan semula in toto adalah untuk memberi perayu peluang kedua bagi memperbaiki kesnya dengan membawa masuk dua isu baru kemungkiran dan mungkir dalam jangkaan pada pihak penentang pertama selepas dia telah menutup kesnya. Jelas ini bertentangan dengan dan memudaratkan penentang pertama, yang tidak boleh dipampas dengan kos (lihat ms 306B–C, 307C–E dan 308A–D).]

Notes

For cases on amendment of pleadings/defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2511–2526 and 2527–2532.

Cases referred to

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997] 1 MLJ 629 (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Ketteman & Ors v Hansel Properties Ltd [1988] 1 All ER 38 (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 3(1)

Appeal from: Civil Suit No KG 104 of 1994 (II) (High Court, Kuching)

DP Naban and *KJ Foo* (*Tan & Lai Advocates*) for the appellant. A

Wong Kim Fatt and *Albert Tang* (*Chew, Jugah, Wan Ullok & Co*) for the first respondent.

Fabian Lim Ann Hoaw (*Lim & Lim Advocates*) for the second to the sixth respondents.

Mokhtar Sidin JCA (delivering the judgment of the court): We have B given our decision earlier and we now give our reasons for doing so.

This is an appeal by the appellant, Bacom Enterprises Sdn Bhd who as the sixth defendant is also the third party in the court below. The first respondent here (Jong Chuk) is the plaintiff in the court below. The second to the sixth respondents are the first to fifth defendants in the court C below. The identification of the various parties is necessary so as to understand the issue on appeal and to avoid any confusion.

The appeal is against the decision of the learned trial judge made in the High Court at Kuching on 6 August 1997. The learned judge had on that day dismissed the application by the appellant to re-amend its amended D statement of defence and counterclaim and adjourned the appellant's application for the recall of the first respondent and other witnesses for further cross-examinations after the respondents had closed their cases.

The facts are as found in the statement of agreed facts (AR 148–153). On 22 October 1991, the first respondent entered into an agreement E with the second to sixth respondents to develop a piece of land known as Lot 29, Block 218, measuring about 1.23 hectares, Kuching North Land District, owned by them jointly at the material time, upon the terms and conditions stated in the said agreement. On 26 May 1993, the second to sixth respondents transferred the said land to the appellant. On 14 May 1994, the appellant notified the first respondent of the revocation of its F power of attorney and instructed the first respondent to vacate the said land within 24 hours. On the same day, the appellant notified the authorities concerned that it did not wish to proceed with anything the first respondent had undertaken. This prompted the first respondent to file Civil Suit No KG 104 of 1994 (II), in the High Court at Kuching against the second G to sixth respondents and the appellant, from which the present appeal arose. The second to sixth respondents also brought in the appellant as the third party. The trial of the civil suit commenced on 11 November 1996. The first respondent (as the plaintiff) and his witnesses gave evidence in court and closed his case on 14 November 1996. On 16 November 1996, the second to sixth respondents closed their case. On 5 March 1997, the H second to sixth respondents made an application to amend their statement of claim against the appellant in the third party proceedings. That application was allowed by the learned judge who heard the suit and pursuant to that the appellant was also given leave to amend its statement of defence in the third party proceedings.

I

In another application, the first respondent was given leave to amend its statement of claim in the main suit. As a result of that, the appellant applied to have its amended defence and counterclaim re-amended. On

A the objection by the first respondent, the application by the appellant was dismissed by the learned judge. Hence, the present appeal.

It is pertinent to note that the amendment applied for by the first respondent and allowed by the court was only in respect of para 26 of the first respondent's statement of claim which is as follows:

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> Further and in the alternative, the sixth defendant, well knowing at all material time that the said agreement had been entered into by the plaintiff with the first, second, third, fourth and fifth defendants as aforesaid, wrongfully and with intent to injure the plaintiff, procured and induced the said first, second, third, fourth and fifth defendants to breach their agreement with the plaintiff and to refuse to perform or further perform the same.
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> C
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> (1) Inducing the first, second, third, fourth and fifth defendants to sell the said land to the sixth defendant surreptitiously and further inducing them to revoke the power of attorney dated 25 January 1992.
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> (2) Falsely and/or fraudulently representing to the original landowners that the sixth defendant would honour and abide by the said agreement and
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> the deed when it never had any real intention to do so as it had a separate plan to develop the said land into a water/family theme park.

We noted that the proposed re-amendments by the appellant (at pp 122–137 of AR) amended some 90% of the appellant's amended statement of defence. It is not confined to the defence of para 26 of the first respondent's
E statement of claim as amended above. It was submitted by Mr DP Naban, learned counsel for the appellant that the proposed re-amendments were merely consequential amendments and for clarifications. As such, the learned judge had erred when he refused the application. Mr Wong Kim Fatt, learned counsel for the first respondent, quite properly conceded that had the appellant confined its consequential amendments in reply to the
F amended para 26 of the statement of claim, the appellant's application would be difficult to resist. Our attention was drawn to the proposed re-amended defence and counterclaim of the appellant where it was shown that the appellant had amended virtually every paragraph of the statement of defence and counterclaim. In addition to that, as pointed out by
G Mr Wong, the appellant had introduced two entirely new issues of breach and anticipatory breach on the part of the first respondent which were not issues to be tried as agreed before and stated by all the parties in the substantive issues to be tried. Mr Wong submitted that the learned judge was correct in refusing to grant leave to the appellant to re-amend the amended statement of defence and counterclaim. Mr Wong further
H submitted that if leave were to be given to the appellant, it should only be confined to para 18 of the proposed re-amended statement of defence and counterclaim which is in reply to the amended para 26 of the statement of claim of the first respondent.

In respect of the right of parties to amend their pleadings, we should
I make reference to O 20 of the Rules of the High Court 1980 ('the RHC'), in particular r 3(1) and some general principles relating to amendment of pleadings. Rule 3(1) of the RHC is the same as O 20 r 3(1) of the English Rules of the Supreme Court 1979. Order 20 r 3(1) provides as follows:

> A party may, without the leave of the Court, amend any pleading of his once at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party.

Generally speaking, the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of money. Where the amendment causes no injustice or prejudice, it should be allowed. Each application must therefore be decided on its own merit. In *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629, the original pleadings were based on the principles of equity, and this court through Abdul Malek Ahmad JCA, in dismissing the appeal and confirming the order granting the amendment, said at p 640 as follows:

> The authorities strongly indicate that the courts should lean in granting applications for amendments even when a new cause of action or line of defence is raised provided it is based on the same facts or arose out of the same transaction subject, however, to an award of costs to the other party for the injustice caused by the amendments. On these considerations, we agree with the learned judge that as far as the amendments were concerned, there is no basic departure from the original pleadings which were grounded on the principles of equity. The sudden change applied for from 30 to 35 years respectively to 99 years is of course not yet explained but a trial would certainly determine all issues and the appellant cannot be said to be really prejudiced if the amendments were allowed except on his objection that the existing lease — as originally pleaded by the fifth respondent in particular and not pleaded at all by the first, third, fourth and sixth respondents — was only for three years commencing in September or October 1992 which would have ended a year ago. However, there is no written tenancy apart from the averments in the original pleadings and that was actually an oral agreement between the vendor and the fifth respondent at around the same time the said premises were being sold to the appellant.

In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, which was cited with approval by the former Supreme Court in *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, Mohd Azmi FJ, in delivering the judgment of the former Federal Court, stated the general principle at pp 214–215:

> Under O 20 of the Rules of the High Court 1980, which is equivalent to O 28 of the Rules of the Supreme Court, a judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 248). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result: (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments would not in effect turn the suit from one character into a suit of another

A and inconsistent character. (See *Mallal's Supreme Court Practice* at p 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has
B already been claimed in the original statement of claim. In this appeal, it is unfortunate that the learned judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of discretion to dismiss the appellants' application. We must therefore review the application afresh.

C Although in the present appeal the learned trial judge had the discretion whether or not to grant the appellant's application for the amendment, and there is a presumption that he was right in the exercising of his discretion (see *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228), we, sitting as an appellate court, can review and interfere with the exercise of his discretion if we are satisfied that the learned judge had erred in
D principle. In the present appeal, we are of the opinion that, as a matter of principle, the learned judge, having allowed the first respondent to amend his statement of claim against the appellant, should have also allowed the appellant to amend its statement of defence and counterclaim strictly in reply to para 26 of the statement of claim. As such, in this connection, we
E are of the view that the learned judge should have allowed the amendment as contained in para 18 which is in response to the amended para 26 of the first respondent's amendment to para 26 of the statement of claim. The proposed amended para 18 reads as follows:

> Paragraph 26 and all the particulars therein of the re-amended statement of claim are denied and the plaintiff is put to strict proof thereof. No inducement
> F or procurement surreptitious or otherwise was ever used by the sixth defendant in the manner alleged or in any manner howsoever or at all. Further, the sixth defendant makes the following averments:
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> (a) that the sixth defendant had approached both the plaintiff and the original landowners in a bona fide manner;
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> G (b) that the original landowners were willing and intending to dispose of ownership of the said land;
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> (c) that the original landowners have represented to the sixth defendant that the plaintiff required the sixth defendant to furnish to the plaintiff a second power of attorney on terms identical to the first power of attorney in order that the terms and conditions of the said agreement
> H may be performed;
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> (d) the second power of attorney was granted and executed on the same date as the transfer of the said land was effected from the original landowners to the sixth defendant;
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> (e) that there never was a separate plan to develop a water/family theme
> I park;
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> (f) further or alternatively, if there ever was such a separate plan (which is denied) it is irrelevant to these proceedings.

However, we are of the opinion that the learned judge was right in refusing to allow all the other amendments sought to by the appellant. We have examined the proposed re-amended 16-page statement of defence and counterclaim of the appellant. We found that virtually every paragraph — from para 1 to para 31 — is substantially amended from top to bottom. There are new allegations of breach against the first respondent in the new paras 3 and 4 in the re-amended statement of defence. These amendments are certainly not consequential amendments. We agree with the learned trial judge when he said:

> Upon perusing through the re-amended defence and counterclaim as shown in encl 141, it is abundantly clear that the sixth defendant undertook a major exercise to re-amend the defence and counterclaim.

Thus, to allow re-amendments in toto is in our opinion to give the appellant the second opportunity to improve its case by bringing in two new issues of breach and anticipatory breach on the part of the first respondent after he had closed his case. Clearly, this would be against and prejudicial to the first respondent, which cannot be compensated by costs. It is far too late in the day for the appellant to raise the two new issues in its defence. If these new issues were allowed to be raised at this very late stage of the proceedings after the first respondent had closed his case, it would mean that the appellant is allowed to relitigate its case to realign his defence to meet the case of the first respondent. Such a practice is undesirable in present day litigation; otherwise, litigation can be delayed or protracted unnecessarily to the prejudice of the party affected. The appellant must be denied a second bite of the cherry. Apart from our opinion relating to para 18 of the re-amended defence, we would endorse the following observations of the learned trial judge in his judgment (at pp 5–6 of the judgment):

> Evidently, in the instant case, if the court accedes to the request of the sixth defendant for leave to re-amend the defence and counterclaim, the plaintiff surely will be prejudiced as a result since both the plaintiff and the first to fifth defendants had already closed their case. The two more important issues raised by the sixth defendant are essentially new averments not anticipated by the plaintiff and also not consequential upon the order of the court dated 17 April 1997.

In this connection, it is pertinent to refer to the following passages in the judgment of Lord Griffiths in the case of *Ketteman & Ors v Hansel Properties Ltd* [1988] 1 All ER 38. This is a decision of the House of Lords and at p 62 his Lordship said:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation

A that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent B necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very C late stage of the proceedings.

For the reasons we have stated, we therefore made an order that the appellant be allowed to re-amend its amended statement of defence and counterclaim only in terms of para 18 of the proposed re-amended statement of defence and counterclaim as stated above. No other amendments D are allowed.

In the circumstances, there was really no purpose for Mr Naban to proceed with his appeal against the learned judge's order or discretion to defer the hearing of his application to recall the first respondent and other witnesses for the purpose of further cross-examination. We will leave this E matter to the discretion of the learned judge who has the conduct of the proceedings in his court. There will be no order as to costs here and the court below in respect of the amendment application by the appellant. The trial will continue before the learned judge.

Order accordingly.

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Reported by Jafisah Jaafar

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